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Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Implementation of Section 309(j) of the)	MM Docket No. <u>97-234</u>
Communications Act -- Competitive Bidding for)	
Commercial Broadcast and Instructional Television)	
Fixed Service Licenses)	
)	
Reexamination of the Policy Statement on Comparative)	GC Docket No. 92-52
Broadcast Hearings)	
)	
Proposals to Reform the Commission's Comparative)	GEN Docket No. 90-264
Hearing Process to Expedite the Resolution of Cases)	

REPLY COMMENTS OF

UNITED CHURCH OF CHRIST, OFFICE OF COMMUNICATION; NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A., COMMUNICATION COMMISSION; BLACK CITIZENS FOR A FAIR MEDIA; CENTER FOR MEDIA EDUCATION; CHINESE FOR AFFIRMATIVE ACTION; THE CIVIL RIGHTS FORUM; FEMINIST MAJORITY FOUNDATION; HISPANIC NATIONAL BAR ASSOCIATION; LEAGUE OF UNITED LATIN AMERICAN CITIZENS; MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL; NATIONAL ASSOCIATION FOR BETTER BROADCASTING; NATIONAL COUNCIL OF LA RAZA; NOW LEGAL DEFENSE AND EDUCATION FUND; RAINBOW/PUSH COALITION; TELECOMMUNICATIONS RESEARCH AND ACTION CENTER; WIDER OPPORTUNITIES FOR WOMEN; WOMEN'S INSTITUTE FOR FREEDOM OF THE PRESS

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SUMMARY

The Commission should adopt incentives designed to promote diversification of ownership. Media ownership is already highly concentrated and becoming even more so. Incentives are needed to combat this trend and ensure that a variety of viewpoints are represented on the airwaves.

Specifically, the Commission can and should adopt incentives to help minorities, women, small businesses, and entities without other media interests compete in auctions and obtain broadcast licenses. Minorities and women are severely under represented in broadcast ownership as a result of discrimination in capital financing. Auction incentives are an effective and constitutional means of addressing the government's compelling interests in promoting diversification of ownership and remedying this discrimination. Similarly, incentives for small businesses and entities without other media interests will allow these entities to compete, thereby enhancing viewpoint and programming diversity.

These Reply Comments demonstrate the need for and constitutionality of incentives in broadcast auctions for minorities, women, small businesses, and entities without other media interests. If the Commission, nonetheless, decides to postpone the adoption of these incentives until its current empirical studies are completed, we urge the Commission to postpone further auctions as well. If the Commission holds an auction of broadcast licences without the incentives in place, the public will suffer because the licenses will not go to a diverse group of owners and concentration of ownership will be intensified.

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Expedite the Resolution of Cases)	

REPLY COMMENTS

United Church of Christ, Office of Communication; National Council of the Churches of Christ in the U.S.A., Communication Commission; Black Citizens for a Fair Media; Center for Media Education; Chinese For Affirmative Action; The Civil Rights Forum; Feminist Majority Foundation; Hispanic National Bar Association; League of United Latin American Citizens; Minority Media and Telecommunications Council; National Association for Better Broadcasting; National Council of La Raza; NOW Legal Defense and Education Fund; Rainbow/PUSH Coalition; Telecommunications Research and Action Center; Wider Opportunities for Women; and Women's Institute for Freedom of the Press [Commenters] hereby submit the following Reply Comments in response to the Commission's Notice of Proposed Rulemaking, MM Docket

No. 97-234, GC Docket No. 92-52, GEN Docket No. 90-264, FCC 97-397, released November 26, 1997 [Notice].

Commenters are public interest organizations representing the views of the general public on issues in the mass media industry. Collectively, these organizations represent the interests and viewpoints of a multitude of broadcast viewers and listeners around the country. These viewers and listeners have a strong interest in receiving programming covering diverse issues and reflecting diverse perspectives. Commenters are concerned about the increasing concentration of media ownership and believe that information, ideas, perspectives, and viewpoints emanating from diverse sources positively contribute to the national and local dialogue on issues of public importance.

In the Notice, the Commission seeks comment on auction policies for commercial broadcast stations. Specifically, the Commission asks in paragraphs 83-97 whether it should adopt special provisions for designated entities, such as minorities, women, small businesses, or other entities which would diversify ownership. In these Reply Comments, Commenters address why special provisions are necessary. While Commenters take no position on whether the Commission should use auctions for pending applications, we argue that whenever the Commission employs auctions, it should adopt credits for minorities, women, small businesses, and entities without other media interests.

The government has a compelling interest in diversifying ownership and viewpoint and remedying discrimination in broadcast ownership. Commenters advocate the use of auction incentives to further these interests. We believe that sufficient evidence exists to justify their immediate adoption. However, if the Commission decides to postpone adoption of incentives

until after its pending empirical studies which analyze the barriers faced by minorities and women are completed, we urge the Commission to postpone all broadcast auctions as well.

I. THE COMMISSION SHOULD ADOPT INCENTIVES DESIGNED TO PROMOTE DIVERSIFICATION OF OWNERSHIP.

In paragraph 92 of the Notice, the Commission asks whether it should adopt bidding credits or other measures designed to promote diversification of ownership. We agree with Cook Inlet Region, Inc. [CIRI] and American Women in Radio and Television [AWRT] that such measures should be adopted by the Commission.¹ Some of the parties commenting here have filed comments in previous proceedings supporting ownership diversity and urging the Commission to address the lack of minority and female owners in the broadcast industry.² We ask that the Commission incorporate those comments into this docket. To avoid repetition, these

¹See CIRI Comments at 8; AWRT Comments at 4-16.

²See Black Citizens for a Fair Media et al. [BCFM] Comments and Reply Comments, Review of the Commission's Regulations Governing Television Broadcasting, MM Docket No. 91-221, May 17, 1995 and March 21, 1997 (advocating strict television cross-ownership rules and waiver policies to promote diversity of ownership, viewpoint and programming); BCFM Comments, Newspaper/Radio Cross-Ownership Waiver Policy, MM Docket No. 96-197, Feb. 7, 1997 (advocating strict newspaper/radio cross-ownership rules and waiver policies to promote diversity of viewpoint and ownership); BCFM Comments, Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, MM Docket No. 94-149, May 17, 1995 (advocating incentives to assist minorities and women obtain mass media facilities); BCFM Comments and Reply Comments, Proposals to Reform the Commission Comparative Hearing Process to Expedite the Resolution of Cases, GEN. Docket No. 90-264, Sept. 14, 1990 and Oct. 15, 1990 (advocating diversity of ownership through streamlined comparative hearing process which ensures opportunities for women and minorities); Women in Communications, Inc. et al. Comments, Reexamination of the Policy Statement on Comparative Broadcast Hearings, GC Docket No. 92-52, June 2, 1992 (advocating separate preference for female applicants in comparative hearings to promote diversity of ownership).

Reply Comments focus on recent developments which demonstrate the urgent need for incentives.

Since the passage of the Telecommunications Act in 1996, media ownership has become highly concentrated. For example, as noted recently by Assistant Secretary of Commerce for Communications and Information and NTIA Administrator Larry Irving, the top ten radio group owners currently control more than 1,000 radio stations and control up to 80% of ad revenue in some radio markets.³ The trend is further illustrated by the fact that “an average of six group owners in each of the top 100 markets control 92% of the advertising revenue and 87% of the listening audience.”⁴ At this rate of consolidation, by the year 2005 “ten companies [will] own almost three-quarters of the nation’s radio stations.”⁵ Irving noted that this trend toward consolidation increases the price of entry and hurts localism and diversity of ownership.⁶ Without incentives as proposed herein, minorities, women, small businesses, and entities without other media interests will not be able to compete for broadcast licenses and the viewing public will suffer.

³Larry Irving, statement to reporters, January 8, 1998 in Comm. Daily, January 9, 1998.

⁴Kofi Asiedu Ofori et al., Blackout? Media Ownership Concentration and the Future of Black Radio, Impacts of the Telecommunications Act of 1996 xv, 26 (1998). This study cites deregulation by the Telecommunications Act of 1996 as the reason for increased concentration of ownership. Prior to the Act for example, no single entity owned more than 40 stations nationally, but within one year of its passage, one entity controls 320 stations with an estimated revenue of \$920.8 million. Id. at xiv, 24-25.

⁵Id. at 64. For further discussion of increasing media concentration, see BCFM Comments, Review of the Commission’s Regulations Governing Television Broadcasting, MM Docket 91-221, March 21, 1997, at 7.

⁶Irving, supra note 3.

A. The Commission, Congress and the courts recognize that diversification of ownership is an important and compelling governmental interest.

As CIRI and NAACP discuss in their Comments, diversification of ownership is an important and compelling governmental interest.⁷ Indeed, the Commission cites “diversification of ownership” as one of the “primary objectives” of its current licensing system.⁸

Moreover, both Congress and the courts recognize the importance of promoting diversity of ownership. When Congress first gave the Commission authority to use auctions, it reaffirmed the national policy of promoting “diversity of media voices.”⁹ In 47 U.S.C. § 309(j)(3)(B), it directed the Commission to promote “economic opportunity and competition,” avoid “excessive concentration of licenses,” and disseminate “licenses among a wide variety of applicants, including small businesses. . . and businesses owned by members of minority groups and women.” Congress further directed the Commission to ensure diversity of ownership in § 309(j)(4)(D), telling the Commission to “ensure that small businesses. . . and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services.”¹⁰ As noted in CIRI’s Comments, the fact that Congress has retained these directives illustrates Congress’ continued support for diversity of ownership in the broadcast industry.¹¹

⁷CIRI Comments at 2-5, 8; NAACP Comments at 1.

⁸Notice, ¶ 92.

⁹47 U.S.C. § 257(b).

¹⁰47 U.S.C. § 309(j)(4)(D).

¹¹CIRI Comments at 5.

Similarly, the Supreme Court recently affirmed in Turner that there is an “important governmental interest” of the “highest order” in “promoting widespread dissemination of information from a multiplicity of sources.”¹² The Court has also held that promotion of diversity of viewpoint qualifies, “at the very least,” as an “important governmental objective.”¹³

Diversity of ownership is especially important in broadcasting because of the enormous role broadcasters play in informing the public. Studies show that television is the public’s main source of news. According to a recent Roper Starch survey, 69% of adults report that they receive most of their news from television.¹⁴ Furthermore, empirical evidence indicates that greater concentration of ownership leads to decreased diversity of viewpoints.¹⁵ For example, studies demonstrate that increasing the number of minority and women-owned stations results in an increase of minority and women-oriented programming.¹⁶ Diversity of ownership prevents a

¹²Turner Broadcasting System, Inc. v. Commission, 117 S. Ct. 1174, 1181 (1997) (quoting Turner Broadcasting System, Inc. v. Commission, 512 U.S. 662, 662, 114 S. Ct. 2445, 2471-2472 (1994)).

¹³See Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 567. This portion of the Metro ruling was *not* overturned in Adarand Constructors v. Peña. Adarand overturned only the portion of Metro which held that race-based preferences were subject to intermediate scrutiny. 515 U.S. 200, 227 (1995). See also Lamprecht v. FCC, 958 F.2d 382, 391 (D.C. Cir. 1992) (“Metro Broadcasting also establishes that the promotion of diversity of viewpoints in general qualifies as an ‘important’ objective within the government’s power.”).

¹⁴Comm. Daily, May 29, 1997. Another study demonstrated that 25% of young white viewers reported that “most of the things I know” about blacks come from television viewing. Charles Atkin et al., Television and Race Role Socialization, 60 *Journalism Quarterly* 407, 414 (1983).

¹⁵BCFM Comments, Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, MM Docket No. 91-221, May 17, 1995, starting at 8.

¹⁶Jeff Dubin & Matthew L. Spitzer, Testing Minority Preferences in Broadcasting, 68 S. Cal. L. Rev. 841 (1995).

small number of broadcasters from setting the agenda for news coverage and stifling programming that may be contrary to the interests of their corporate parents.¹⁷ To increase diversity of ownership, viewpoint, and programming, the Commission must adopt policies to help under represented entities participate in broadcast auctions.

II. TO DIVERSIFY OWNERSHIP, THE COMMISSION SHOULD ADOPT INCENTIVES TO HELP MINORITIES, WOMEN, SMALL BUSINESSES, AND ENTITIES WITHOUT OTHER MEDIA INTERESTS OBTAIN BROADCAST LICENSES IN AUCTIONS.

To ensure the diversification of broadcast ownership, viewpoints, and programming, the Commission should utilize incentives in broadcast auctions for minorities, women, small businesses, and entities without other media interests.¹⁸ Without incentives like bidding credits, these groups have an extremely difficult time breaking into the concentrated industry because of high prices and other barriers. Contrary to the claims of commenters Susan Bechtel and Sinclair Broadcast Group, Inc.,¹⁹ such measures are both constitutional and necessary. Moreover, there

¹⁷For further discussion, see BCFM Reply Comments, Review of the Commission's Regulations Governing Television Broadcasting, MM Docket No. 91-221, March 21, 1997 at 3 (advocating strict cross-ownership rules and waiver policies to promote diversity of viewpoint, ownership and programming).

¹⁸These Reply Comments are limited to discussing policies for commercial entities in future auctions of commercial broadcast licenses. Commenters, however, think it may be reasonable to give incentives to non-commercial entities competing on commercial bands. See National Public Radio et al. Comments at 20-24.

¹⁹See Susan M. Bechtel Comments at 10-11; Sinclair Broadcast Group, Inc. [Sinclair] Comments at 1, 3. While we disagree with Sinclair's contention that minority bidding credits would be unconstitutional, we agree that the Commission should adopt other pending proposals, such as incubator programs, that would increase opportunities for minority and female broadcast ownership.

are no significant costs to providing such bidding incentives. Indeed, a recent study has shown that using bidding credits actually increases government revenue by creating increased competition in auctions.²⁰ Thus, the many benefits of incentives can be achieved with little or no costs.

A. Incentives for minorities pass constitutional muster and should be adopted for broadcast auctions.

We agree with CIRI and the NAACP that the Commission can and should adopt race-based incentives for broadcast auctions.²¹ Such incentives are necessary to promote diversity of ownership and remedy past discrimination in the industry. Under Adarand, race-based classifications must meet strict scrutiny.²² To satisfy strict scrutiny, the classifications must serve a compelling governmental interest and be narrowly tailored to further that interest.

As discussed above, there is a compelling governmental interest in increasing diversity of ownership and viewpoint. Broadcast ownership is highly concentrated and minorities are extremely under represented as owners. Minorities own a mere 322 of 11,475 commercial broadcast stations, representing only 2.8% of the total commercial ownership.²³ By comparison,

²⁰ See Ian Ayres & Peter Cramton, Deficit Reduction Through Diversity: How Affirmative Action at the FCC Increased Auction Competition, 48 Stan. L. Rev. 761, 763 (1996).

²¹CIRI Comments, at 1-6; NAACP Comments, at 1-3.

²²Adarand Constructors v. Pena, 515 U.S. 200, 225 (1995).

²³NTIA, Minority Commercial Broadcast Ownership in the United States, Findings at 1 (1997).

minorities represent 28.3% of the total U.S. population.²⁴ One study estimates that if current market trends continue, black ownership of radio stations in major markets are at risk of extinction within the next five years.²⁵ This severe lack of outlets for minority voices limits the diversity of programming available to all.

As NAACP notes in its Comments, the lack of minority ownership is attributable to past and current discrimination in lending to minorities.²⁶ While the amount of money available to capital venture funds has greatly increased overall in the past four years, the amount of this money available to people of color has not increased comparatively.²⁷ According to an NTIA study, “white entrepreneurs are more likely to receive capital from banks than their minority counterparts despite the same qualifying background and profile.”²⁸ The Commission acknowledged in the proceeding to implement § 257 of the Telecommunications Act that minority owned businesses have difficulty in obtaining credit and are denied employment

²⁴U.S. Bureau of Census, June 1, 1997.

²⁵Ofori, supra note 4, at 40.

²⁶See NAACP Comments at 1.

²⁷Ofori, supra note 4, at 55-56. See also NTIA, Capital Formation and Investment in Minority Enterprises in the Telecommunications Industries, Executive Summary at 1 (April 1995).

²⁸NTIA, Minority Commercial Broadcast Ownership in the U.S., Findings at 1 (1997). Other studies have revealed similar evidence of discrimination. In 1992, the Federal Reserve Bank of Boston reported that a black or Hispanic applicant for a loan in the Boston area is 60% more likely to be denied a mortgage loan than a similarly situated white applicant. See Mortgage Lending in Boston, in FCC 5th Report and Order, Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, at ¶ 98 (July 15, 1994).

opportunity because of discrimination.²⁹ Because they have no other options, minority businesses are often forced to rely on financiers and capitalists who impose unfavorable terms.³⁰ Minority owners cite this lack of capital as a primary factor for the consistently low numbers of minority broadcast ownership.³¹

Adopting race-based incentives is a constitutional means of remedying discrimination and promoting diversity of ownership and viewpoints. The Supreme Court has found that the government has a compelling interest in remedying this type of discrimination.³² Based on past experience with auctions, minority owners are unlikely to obtain licenses without such incentives. Once the Commission eliminated its race-based bidding provisions in the PCS auctions, the incentives for many companies to offer financing or enter into strategic alliances with minority entrepreneurs disappeared; as a result, many minorities found it more difficult or impossible to participate in the PCS auction, and few minority owned businesses acquired licenses.³³

Adopting incentives for minorities in broadcast auctions would be a narrowly tailored means for the Commission to remedy discrimination and lack of ownership diversity in broadcasting because it would increase participation in auctions without negatively impacting

²⁹FCC Report, Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, FCC 97-164, at ¶¶ 215-216 (May 8, 1997).

³⁰Id.

³¹NTIA, Minority Commercial Broadcast Ownership in the U.S., Findings at 1 (1997).

³²See Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

³³FCC Report, Section 257 Proceeding, FCC 97-164, at ¶ 147.

other bidders. As NAACP explained, such incentives simply expand the pool of bidders without denying anyone opportunity.³⁴

Increasing minority ownership through these incentives will diversify viewpoint and increase minority-oriented programming. The Supreme Court has recognized this nexus between diversity of ownership and diversity of viewpoint:

While we are under no illusion that members of a particular minority group share some cohesive, collective viewpoint, we believe it a legitimate inference for Congress and the Commission to draw that as more minorities gain ownership and policymaking roles in the media, varying perspectives will be more fairly represented on the airwaves.³⁵

Indeed, studies show a direct relationship between minority broadcast ownership and minority-oriented programming. A study of over 7,000 broadcast stations revealed that “increasing the number of minority-owned broadcast stations increases the amount of minority-oriented programming.”³⁶ Minority owners are more likely to provide entertainment, news and information programs that serve the overall interests of minority audiences.³⁷ To address the compelling interests of promoting diversity of ownership and viewpoint and remedying discrimination in the industry, the Commission can and should adopt race-based incentives in all future broadcast auctions.

³⁴NAACP Comments at 3.

³⁵Metro Broadcasting, 497 U.S. 547, 582.

³⁶Dubin & Spitzer, supra note 16, at 841, 867.

³⁷Id. at 863-869.

B. Gender-based incentives are constitutional under VMI and should be adopted for broadcast auctions.

We strongly agree with AWRT's Comments regarding the need for gender-based incentives. Gender-based incentives are constitutional and should be adopted by the Commission for broadcast auctions. Under VMI, gender-based incentives must pass intermediate scrutiny.³⁸ To survive intermediate scrutiny, the justification for a program must be "exceedingly persuasive," meaning that the government must show the classification serves "important governmental objectives" and the "discriminatory means employed are substantially related to the achievement of those objectives."³⁹ Gender-based incentives meet these requirements.

As demonstrated supra pages 5-8, there is an important and compelling governmental interest in achieving Congress' goal of widely disseminating spectrum licenses and fostering a diversity of media voices.⁴⁰ In addition, the Court reaffirmed in VMI the important interest in remedying gender discrimination in particular.⁴¹ Like minorities, women are under represented in broadcast ownership because of the discrimination they face when trying to raise capital.⁴² In

³⁸United States v. Virginia, 116 S. Ct. 2264 (1996) (VMI). See also Lamprecht v. FCC, 958 F.2d 382 (1992).

³⁹VMI, 116 S. Ct. 2264, 2275 (1996).

⁴⁰See 47 U.S.C. §§ 257, 309(j); AWRT Comments at 9.

⁴¹See VMI, which states that "sex classifications may be used to compensate women 'for particular economic disabilities they have suffered,'" to "promote equal employment opportunity," and to "advance full development of the talent and capacities of our Nation's people." 116 S. Ct. 2264, 2276.

⁴²AWRT Comments at 11-15.

1997, not one of the top twenty-five radio or television owners were women.⁴³ In fact, in the Spring of 1997, fewer than twenty total radio stations were owned by women.⁴⁴ The absence of female owners is not a new trend. Comments in earlier proceedings document female under representation in ownership and discrimination in detail,⁴⁵ and demonstrate the validity of incentives to address these problems.⁴⁶

Gender-based incentives are substantially related to the achievement of broadcast and viewpoint diversity because not only will female participation result in less concentration of ownership, but female ownership of broadcast media will also result in diversity of viewpoint.⁴⁷ A study of over 7,000 radio stations has shown that a higher degree of female ownership leads to significantly more diverse programming.⁴⁸ As AWRT illustrates in its comments, incentives for women are a direct way of promoting female participation and increasing opportunity for a

⁴³See Spectrum Detroit Comments, Review of the Commission's Regulations Governing Television Broadcasting, MM Docket 91-221, Feb. 7, 1997, at 25.

⁴⁴Based on inquiries by Kofi Ofori of the Civil Rights Forum to AWRT.

⁴⁵See, e.g., Women in Communications, Inc. Comments, Reexamination of the Policy Statement on Comparative Broadcast Hearings, GC Docket 92-52, June 2, 1992, at 9-12.

⁴⁶See Women in Communications, Inc. Comments, GC Docket 92-52, June 2, 1992, at 13; BCFM comments, Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, MM Docket 94-149, May 17, 1995. See also AWRT Comments at 16.

⁴⁷The Supreme Court has recognized that women offer distinct viewpoints. In J.E.B. v. Alabama ex. rel. T.B., Justice O'Connor explained in her concurrence that "a person's gender and resulting life experience will be relevant to his or her view. . . ." 511 U.S. 127, 149 (1994).

⁴⁸Dubin & Spitzer, supra note 16, at 863.

diversity of owners to present diverse views to the public without adversely impacting other potential bidders.⁴⁹

C. Small business incentives are a rational means of promoting diversity of ownership and should continue to be utilized in broadcast auctions.

We agree with CIRI's Comments that the Commission should use bidding credits and other tools to promote small business participation in auctions.⁵⁰ Small businesses are a crucial part of our economy. The Commission has recognized that "small businesses not only constitute the vast majority of all employers in this country, but are able to innovate faster than larger firms and to serve niche markets that may not be served by large corporations."⁵¹ Incentives for small businesses must meet only rational basis scrutiny to be constitutional. This standard is met because such incentives will promote small business participation and diversity of ownership.

The growing consolidation of big businesses in the communications market perpetuates itself by increasing the price of entry, thereby hurting localism and diversity of ownership.⁵² Small business owners say that "the recent surge in acquisition activity has driven up the price of

⁴⁹AWRT Comments at 4-6.

⁵⁰CIRI Comments at 9-10. The Commission must strengthen attribution rules and define small businesses in a way which ensures that the proper entities actually benefit. See Mike Mills, In the Next FCC Auction, the Wealthy Will Get the Discounts, Wash. Post, Feb. 12, 1998, at D1.

⁵¹FCC Report, Section 257 Proceeding, FCC 97-164, ¶ 5.

⁵²See Irving, supra note 3.

stations beyond what most small entrepreneurs can afford.”⁵³ According to these small business owners,

current station prices do not merit the cash flow multiples for which they are being sold. Instead, stations tend to be valued in terms of their worth in the hands of market dominators who are in the privileged position of being able to leverag[e] multiple holdings into increased advertising dollars.⁵⁴

These high prices put licenses out of reach for small businesses whose most commonly reported sources of initial capital are personal financing, like family savings and gifts, and Small Business Administration loans.⁵⁵ Incentives for small businesses will help to reduce the amount of capital they need to participate in broadcast auctions, and to ensure that broadcast ownership becomes more diversified.

D. Incentives for entities which do not already own broadcast licenses are a rational means of promoting diversity of ownership and should be adopted for broadcast auctions.

The Commission should promote diversity of ownership by adopting auction incentives for businesses which do not already own broadcast licenses. Such incentives would survive judicial scrutiny under rational basis review because of the established need for broadcast diversity. Diversity of ownership has been one of the primary criteria used by the Commission in awarding licenses in the past, and remains a valid criterion after *Bechtel*.⁵⁶

⁵³Ofori, supra note 4, at 40-41.

⁵⁴Id.

⁵⁵FCC Report, Section 257 Proceeding, at ¶ 37.

⁵⁶See *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993) (finding arbitrary and capricious integration preferences for applicants who intended to own and manage stations).

As has been demonstrated above, media licenses are highly concentrated and the trend is increasing. This concentration has made it increasingly difficult for newcomers to compete for high-priced licenses in auctions. To combat concentration and promote the important and compelling interest in diversity of ownership, the Commission should adopt credits for entities which do not already own licenses. These credits will ensure that under represented businesses can break into the communications industry and provide fresh viewpoints.

III. THE COMMISSION HAS SUFFICIENT EVIDENCE TO ADOPT IMMEDIATELY INCENTIVES TO PROMOTE MINORITY, FEMALE, SMALL BUSINESS, AND OTHER DIVERSE OWNERSHIP.

The record before the Commission in this and past proceedings demonstrates the need for incentives. Because the broadcast industry is becoming more concentrated, minorities, women, small businesses, and entities without broadcast interests will be denied the opportunity to compete with established owners for broadcast licenses unless the Commission adopts incentives to promote diversity of ownership.

In addition to the evidence which has been provided in this and other rulemakings, the Commission has commissioned five studies which will offer further empirical evidence of discrimination and other barriers to broadcast ownership. These studies are designed to analyze evidence of the under representation of minority and women owners in the broadcast industry, document the pool of minorities and women interested in ownership, and determine whether discrimination exists against minorities and women in the industry. An additional study, commissioned by the Minority Media and Telecommunications Council [MMTC] and the

Rainbow/PUSH Coalition, is examining the extent to which the Commission's past broadcast licensing practices ratified and validated discrimination against minorities. Preliminary research by MMTC indicates that the Commission's practices substantially depressed minority ownership by imposing artificial regulatory barriers which lacked business or regulatory justification.⁵⁷ Thus, minority ownership incentives are likely to be justified as a remedial program as well as a pro-diversity program.⁵⁸

The evidence already before the Commission coupled with evidence which will result from the Commission's current studies will justify the adoption of incentives for designated

⁵⁷For example, in 1965, the Commission imposed the requirement that a new broadcast applicant show that it had sufficient funds to operate a station for one year without revenue. The Commission repealed this requirement in 1982, recognizing that it "conflicts with Commission policies favoring minority ownership and diversity because its stringency may inhibit potential applicants from seeking broadcast licenses." Financial Qualifications Standards, 87 FCC 2d 200, 201 (1981), repealing Ultravision Broadcasting Company, 1 FCC 2d 545, 547 (1965).

⁵⁸Congress has found that "the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications. . . ." H.R. Conf. Rep. 97-765, at 43 (1982). Recognizing that its own past licensing policies may have contributed substantially to minorities' and women's late start in broadcasting, the Commission has sought comment on the argument that:

[a]s a result of our system of awarding broadcast licenses in the 1940s and 1950s, no minority held a broadcast license until 1956 or won a comparative hearing until 1975 and. . . special incentives for minority businesses are needed in order to compensate for a very long history of official actions which deprived minorities of meaningful access to the radiofrequency spectrum.

Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (Notice of Inquiry), 11 FCC Rcd 6280, 6306 (1996) (citing Statement of David Honig, Executive Director, MMTC, En Banc Advanced Television Hearing, MM Docket No. 87-268 (Dec. 12, 1995) (on file with counsel of record) at 2-3 and n. 2). MMTC was referring to the Commission's history of routinely issuing broadcast licenses to segregated institutions which used the licenses to train the next generation of broadcasters. These licensing decisions guaranteed that two generations of trained broadcast professionals, managers and owners would be almost exclusively white men. See, e.g., Southland Television Co., 10 RR 699, 750, recon. denied, 20 FCC 159 (1955) (the Commission awarded a VHF license to a known segregationist).

entities. Because incentives for small businesses and entities without other media interests only face rational basis scrutiny, the Commission can adopt these immediately based on the record before it. Although gender and race-based incentives face more stringent scrutiny, the evidence before the Commission justifies these incentives as well.

Should race and gender based incentives be challenged, the Commission can rely on both pre-enactment and post-enactment evidence as justification. Federal appellate courts which have considered the question have allowed the use of post-enactment evidence to justify race-based affirmative action programs.⁵⁹ The pre and post-enactment evidence together will provide compelling justification for the incentives.

If, despite the evidence, the Commission remains unconvinced that incentives for minorities or women will pass heightened judicial scrutiny, we urge the Commission to postpone its broadcast auctions until its current studies are complete and it has a full record documenting why the incentives are necessary.⁶⁰ Although the Notice does not state how many frequencies are available for which no applications are pending, the number of such frequencies are certainly limited. Were the Commission to auction these available licenses in a block as proposed, without affording women and minorities a meaningful opportunity to compete for these licenses, these potential owners will lose forever any chance to bid.

⁵⁹See DOJ Memo to General Counsels, June 28, 1995, 1995 DLR 125 (1995). See also, e.g., Engineering Contractors Assn. of South Florida, Inc. v. Metropolitan Dade County, 122 F.3d 895, 911-912 (11th Cir. 1997) (allowing post-enactment evidence to prove discrimination); Contractors Assn. of Eastern Pennsylvania v. City of Philadelphia, 91 F.3d 586, 593 (3d Cir. 1996) (same); Concrete Works of Colo. v. Denver, 36 F.3d 1513, 1521 (10th Cir. 1994) (same).

⁶⁰We agree with AWRT's Comments at 3, which urge the Commission to adopt incentives *prior to* the auctioning of broadcast licenses.

The public benefits of waiting until incentives are adopted before conducting auctions far outweigh the costs. The costs of holding the auctions before incentives are adopted include a continued decrease in minority and female ownership and an increase in ownership consolidation. In contrast, the cost to the public from the temporary postponement of the auctions will be minimal. Therefore, we urge the Commission to adopt the incentives described in these comments. If the Commission decides to postpone adoption of these incentives, we ask the Commission to postpone further broadcast auctions until its studies are completed and it has gathered further justification for the incentives.

Respectfully submitted,

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